Docket: 2011-2705(IT)G

BETWEEN:

MICHELLE COLEEN CONNOLLY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on September 22 and 23, 2015, at Halifax, Nova Scotia.

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the Appellant:	Michael Scott
Counsel for the Respondent:	Dominique Gallant

JUDGMENT

The appeal from the assessment dated February 22, 2010, the notice of which bears number 909163, made by the Minister of National Revenue pursuant to section 160 of the *Income Tax Act* is allowed with costs and the assessment is vacated in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 2nd day of June 2016.

"Réal Favreau"

Favreau J.

Citation: 2016 TCC 139
Date: 20160602
Docket: 2011-2705(IT)G

BETWEEN:

MICHELLE COLEEN CONNOLLY,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Favreau J.

[1] This is an appeal from the assessment dated February 22, 2010, the notice of which bears number 909163, made by the Minister of National Revenue (the "Minister") pursuant to section 160 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) as amended (the "*Act*"). The appellant was assessed for the amount of $76,884.17 in respect of cheques she received from her common-law partner, Mr. Wayne MacVicar, while he had a tax debt in the amount of no less than $76,884.17 in respect of his 2000 taxation year. The relevant cheques were deposited into the appellant's bank accounts between February 10, 2003 and October 21, 2003.

[2] At the beginning of the hearing, the parties have submitted an Agreed Statement of Facts which reads as follows:

General

1. The Respondent issued the Appellant a Notice of Assessment/Reassessment dated February 22, 2010 in the amount of $76,884.17 (the "**Notice of Assessment**").

2. The Notice of Assessment was issued pursuant to subsection 160(1) of the *Income Tax Act* (Canada) (the "***Income Tax Act***") in relation to the transfer of cash and cheques from Wayne MacVicar ("**MacVicar**") to the Appellant between February 10, 2003 and October 31, 2003 (the "**Reassessment Period**").

3. The Appellant does not dispute that during the Reassessment Period, she did in fact receive $76,884.17 from MacVicar.

4. At all material times during the Reassessment Period, MacVicar was liable to pay at least $76,884.17 under the *Income Tax Act* in relation to the 2000 taxation year.

5. MacVicar was, and is, the Appellant's common-law partner.

6. During the relevant period, the Appellant owned and occupied a house located at 46 Sarah Crescent, Dartmouth, Nova Scotia (the "**Sarah Crescent House**"). MacVicar lived in the house with the Appellant.

7. The Appellant was the sole legal owner of the Sarah Crescent house and was the sole mortgagee of the Sarah Crescent house.

Payroll

8. Between January 1, 2002 and December 31, 2002, cheques payable to "Cash" in the aggregate amount of $17,132 were written on a bank account held solely by the Appellant. Copies of such cheques can be found at Tab 12 and Tab 13 pages 1 through to and including 6 of the Joint Book of Exhibits.

9.

a) Between March 8, 2002 and September 12, 2003, cheques payable to "Wayne MacVicar" in the aggregate amount of $33,912.05 were written on a bank account held solely by the Appellant. Copies of such cheques can be found at Tab 13 pages 8, 10 through to and including 23 and page 29, and Tab 16 pages 4, 5 and 7 of the Joint Book of Exhibits.

b) On April 4, 2003, a PDA History for Bank Account ****336 shows a cheque in the amount of $2,290 written on a bank account held solely by the Appellant. A copy of such PDA History can be found at Tab 13 page 7.

c) Between April 18, 2003 and September 5, 2003, on-line print outs show cheques in the aggregate amount of $13,995 written on a bank account held solely by the Appellant. Copies of such on-line print outs can be [*sic*] Tab 13 page 9 and pages 24 through to and including 28.

10. The aggregate sum of the payments reference in paragraphs 8 and 9(a) through to and including 9(c) above is $67,329.05.

VISA

11. Between January 1, 2002 and October 31, 2003, cheques payable to VISA account 4512 1245 1928 1522 totaling $38,971.61 were written on a bank account held solely by the Appellant. Copies of such cheques can be found at Tab 15.

Truck

12. Between February 4, 1999 and August 8, 2002, the Appellant was the sole legal owner of a 1996 GMV (*sic*) Sierra truck ("**Truck #1**"). Truck #1 was financed by the Bank of Montreal in the name of the Appellant. A copy of the financing document can be found at Tab 10.

13. Between January 1, 2002 and July 8, 2002, aggregate payments due for the purchase of Truck #1 were in the amount of $3,150.

14. Between August 8, 2002 and October 31, 2003, the Appellant was the sole legal owner of a 2000 GMC truck ("**Truck #2**"). Truck #2 was financed by the Royal Bank of Canada in the name of the Appellant. A copy of the financing document can be found at Tab 10.

15. Between August 8, 2002 and October 31, 2003, aggregate payments due for the purchase of Truck #2 were in the amount of $9,058.50.

16. In the period between January 1, 2002 and October 31, 2003, the Appellant held, in her name, a policy of insurance (motor vehicle) in relation to her Honda CR-V and the above noted trucks. Total monthly premiums in relation to the above-noted insurance policy were of $228.90. A copy of the insurance summary can be found at Tab 10.

17. It is not contested that in the period between January 1, 2002 and October 2003, the Appellant aggregate payments due for vehicle insurance premiums were in the amount of approximately $5,035.80.

Cheques

18. In addition to the aforementioned cheques, between January 11, 2002 and July 17, 2002, cheques payable to "Wayne MacVicar" in the aggregate amount of $8,197.58 were written on a bank account held solely by the Appellant. Copies of such cheques can be found at Tab 16 pages 1 through to including 3, page 6 and page 8 of the Joint Book of Exhibits.

19. In addition to the aforementioned cheques, on 06-02-03, a withdrawal slip in the aggregate amount of $3,750 was written on a bank account held solely by the Appellant. A copy of such withdrawal slip can be found at Tab 16 page 9 of the Joint Book of Exhibits.

[3] Even if the parties did not clearly state the scope of the Agreed Statement of Facts referred to above, I am assuming that the parties had the intention to file only a partial Agreed Statement of Facts to allow further evidence from the witnesses.

[4] The appellant testified at the hearing. The appellant is a business analyst working in the information technology environment for the province of Nova Scotia. She and Mr. MacVicar have lived together since 1990. They rented an apartment until the appellant decided to buy the Sarah Crescent house in 1994. The original purchase price was $92,000 and the mortgage was $62,000, payable in the amount of $1,000 per month. Mr. MacVicar was not interested in buying the house but he agreed to move in the house and to assume 50% of the mortgage payments. According to the appellant, Mr. MacVicar agreed to pay $500 per month as what she described to be rent. The appellant admitted that there was no written agreement confirming Mr. MacVicar's obligation to pay the $500 monthly and that she never reported it as rental income in her income tax returns. She said that she kept track of the rent paid on her computer.

[5] During 2002 and 2003, Mr. MacVicar owned and operated, as a sole proprietor, a painting business in which the appellant had no interest. This business employed four or five employees throughout the year. In addition, Mr. MacVicar had a 40% interest in Guzzler's Dining Room & Lounge Limited ("Guzzler"), his second business.

[6] Due to his previous bankruptcies in 1992 and 1997, Mr. MacVicar was unable to have a personal bank account, and at no material time, did the Appellant and Mr. MacVicar have a joint bank account. However, Mr. MacVicar did obtain a Visa credit card ("Visa").

[7] Because of his financial difficulties during the 2002 and 2003 taxation years, Mr. MacVicar did not always have sufficient cash flow to deal with his business and personal expenses and to pay his Visa on time. The Appellant and Mr. MacVicar then made an agreement under which she would advance the sums of money he needed for his business operations. In exchange, he would repay her in full whenever he would have the money available. All the money the appellant advanced was from her line of credit with the Royal Bank and her personal bank account. This line of credit was used solely for the purposes of paying Mr. MacVicar's expenses, either business or personal.

[8] The way the arrangement worked was as follows: the appellant deposited cheques Mr. MacVicar received in the course of his businesses between

February 10, 2003 and October 31, 2003 into her personal bank account as they could not be deposited in her line of credit. She then applied a portion of the amounts deposited in her bank account against the amounts Mr. MacVicar already owed her and the balance was transferred to her line of credit.

[9] The appellant and Mr. MacVicar did not keep any contemporaneous documentary evidence supporting the tracking of the debt owed by Mr. MacVicar. The appellant proceeded on an informal basis and Mr. MacVicar would normally ask the appellant how much he owed her from time to time.

[10] The appellant was not acting as a paying agent for Mr. MacVicar. She signed cheques for cash or to the order of Mr. MacVicar who used them to pay his employees' salaries, the payroll tax remittances and the Goods and Services Tax remittances and other business expenses, such as the Visa payments. She alleged that Mr. MacVicar's personal and living expenses were not paid through her personal line of credit.

[11] The appellant also stated that Mr. MacVicar declared another bankruptcy in 2004 and that she received no amount of money from him at that time. She was not even listed as a creditor in this bankruptcy.

[12] Mr. MacVicar also testified at the hearing. He confirmed his bankruptcies in 1992, 1997 and 2004 and the acquisition of an interest in Guzzler with a loan from the appellant. He also confirmed the rental arrangement made with the appellant before moving in the appellant's house and the financial arrangements made with the appellant for the payment of his employees' salaries and other business expenses. He said that he did not track the debt owed to the appellant and that his Visa credit card was used exclusively for his two businesses.

[13] Mr. MacVicar said that he did not have a driver's licence for six years including the 2002 and 2003 years and he stated that all his clients in the painting business paid him by cheques that were deposited in the appellant's personal bank account. During 2002 and 2003, he said that he had other revenues coming from Guzzler that he used for his personal and living expenses and that Guzzler had a bank account for which he had signing authority.

Issue

[14] The issue in this appeal is to determine whether fair market value consideration was given in exchange for the transfer of property from Mr. MacVicar to the appellant.

Position of the Appellant

[15] The appellant states that pursuant to her agreements with Mr. MacVicar, she advanced and lent him money and incurred expenses on his behalf for both personal and business purposes.

[16] It is clear from the intention of the appellant and Mr. MacVicar that such advances, loans or payments were to be considered as enforceable loans under which Mr. MacVicar had the obligation to repay the appellant.

[17] She submits that the transfers of property she received during the Period were partial reimbursements of the money Mr. MacVicar owed her pursuant to verbal agreements they entered into and that, for this reason, subsection 160(1) of the *Act* does not apply to the present case.

Position of the Respondent

[18] The respondent argues that there was no consideration for the amounts the appellant received during the Period.

[19] Alternatively, the respondent submits that the loans, if any, were not legally enforceable. There was no written agreement, no terms of reimbursement and they did not carry interest.

[20] No record was kept up-to-date to follow the evolution of the loans and their repayments. The appellant mostly relied on a spreadsheet prepared after the relevant period. For these reasons, the respondent submits that the appellant did not establish the fair market value of the consideration.

Analysis

[21] In the version applicable to the 2010 taxation year, the relevant portion of section 160 of the *Act* reads as follows:

> **Tax liability re property transferred not at arm's length**

(1) Where a person has, on or after May 1, 1951, transferred property, either directly or indirectly, by means of a trust or by any other means whatever, to

(*a*) the person's spouse or common-law partner or a person who has since become the person's spouse or common- law partner,

(*b*) a person who was under 18 years of age, or

(*c*) a person with whom the person was not dealing at arm's length,

the following rules apply:

(*d*) the transferee and transferor are jointly and severally, liable to pay a part of the transferor's tax under this Part for each taxation year equal to the amount by which the tax for the year is greater than it would have been if it were not for the operation of sections 74.1 to 75.1 of this Act and section 74 of the *Income Tax Act*, chapter 148 of the Revised Statutes of Canada, 1952, in respect of any income from, or gain from the disposition of, the property so transferred or property substituted therefor, and

(*e*) the transferee and transferor are jointly and severally, liable to pay under this Act an amount equal to the lesser of

(i) the amount, if any, by which the fair market value of the property at the time it was transferred exceeds the fair market value at that time of the consideration given for the property, and

(ii) the total of all amounts each of which is an amount that the transferor is liable to pay under this Act in or in respect of the taxation year in which the property was transferred or any preceding taxation year,

but nothing in this subsection shall be deemed to limit the liability of the transferor under any other provision of this Act.

[22] For subsection 160(1) of the *Act* to apply, four conditions need to be met:

(a) the transferor must be liable to pay tax under the Act at the time of transfer;
(b) there must be a transfer of property, either directly or indirectly, by means of a trust or by any other means whatever;
(c) the transferee must either be a person not dealing at arm's length with the transferor, be a person under the age of 18 at the time of the transfer or a person that have since become a spouse or common-law partner of the transferor;
(d) the fair market value of the property transferred must exceed the fair market value of the consideration given by the transferee.

[23] It is not disputed that, in the present appeal, the first three conditions are met and that the sole issue to be determined is whether the fair market value of the property transferred from Mr. MacVicar exceeded the fair market value of the consideration given by the appellant.

[24] In such cases, the onus of establishing the fair market value of the consideration given by the appellant for the amounts deposited in her bank account pursuant to a legally binding agreement is on the appellant.

[25] The respondent referred me to the decision I wrote in *Pelletier v. Canada*, 2009 TCC 541 which, at first glance, may appear very similar to the case at hand. The relevant passages of this decision are as follows:

> [7] The Appellant testified at the hearing and stated that there was no documentary evidence of the loans, except for the cheques of Mr. Farrell payable to her. There was no loan agreement, no promissory notes, no registry or record of any kind and no document specifying the terms and conditions of the reimbursements. She explained that the loans were made pursuant to an informal verbal arrangement and that the loans were to be reimbursed whenever she could afford it. She said that her final payment to Mr. Farrell was made in 2008.
>
> [8] In a letter dated October 14, 2007 addressed to CRA, the Appellant offered the following explanation as to why, on December 26, 2005, she deposited cheques payable to Mr. Farrell in her own bank account:
>
> > In December of 2005, Mr. Farrell lost his job in Ottawa and moved to Montreal. I lent him some money so he paid me back by giving me his pay cheques as he had not yet opened a local bank account.
>
> [9] Mr. Farrell also testified at the hearing and he confirmed the fact that he had made the loans to the Appellant and that the loans had been reimbursed by her in full. He further said that he has kept track of the amounts of money loaned and reimbursed but he did not offer any documentary evidence to that effect.
>
> . . .
>
> [13] In tax matters, documentary evidence is almost always required from taxpayers where the evidence submitted is not sufficient or is vague, where the witnesses are not credible or where there are contradictions in the information provided by the taxpayers. In this case, CRA was absolutely warranted in requesting documentary evidence pertaining to the reimbursement of the loans as the Appellant did not keep any record and as there were contradictions in the information provided by the Appellant.

(Emphasis added)

[26] In *Pelletier, supra*, after having listed the irregularities from the evidence before the Court, I further addressed the taxpayer's credibility:

> [16] The contradictions referred to in the two preceding paragraphs seriously undermine the credibility of the Appellant. I am not persuaded at all that the three cheques payable to Mr. Farrell for a total amount of $1,155 constituted partial reimbursement of loans and I am inclined to think that they could very well reflect loans made by the Appellant to Mr. Farrell. In view of the insufficiency of the evidence offered by the Appellant, the assessment must stand. It was the Appellant's responsibility to keep proper records of her own personal transactions.

[27] I would say that one should abstain from concluding that documentary evidence is always necessary, as it is well recognized that verbal contract may be as valid as if it was set out in writing. However, the difficulty of establishing the existence of such a verbal contract will lie on the testimonial evidence submitted by a witness – thus his or her credibility.

[28] As Sheridan J. stated in *Pickard v. Canada*, 2010 TCC 535:

> [15] Applying the principles from Livingston, Waugh and Raphael to the present case, the onus is on Mrs. Pickard to establish the fair market value of the consideration given for the amounts deposited in her account pursuant to a legally binding agreement and further, that there is a correspondence between that value and the amounts reported as income. That is a difficult onus to meet, especially in a non-arm's length transaction where one of the parties to the alleged agreement does not testify, where there is an absence of corroborating documentary evidence and where, to the extent records do exist, their accuracy is questionable.

(Emphasis added)

[29] I would nonetheless note that such onus is not insurmountable.

[30] Even if it is preferable that all agreements be put in writing, it is not up to this Court to dictate so. As the appellant was able to provide credible evidence of the existence of such an agreement, I believe she successfully refuted the Minister's assumption that she provided no consideration in exchange of the funds from her common-law partner that were deposited in her bank account.

[31] The appellant appeared to me as a highly credible witness that, unfortunately, had a conjugal relationship with a recurrent tax debtor. Throughout

the 2002 and 2003 taxation years, in order to overcome Mr. MacVicar's financial difficulties, they agreed that she would advance him the money he needed for his two businesses and for his personal expenses. The evidence revealed that, during those years, the appellant had effectively advanced funds to Mr. MacVicar for both businesses and for his personal expenses.

[32] Under the terms of the verbal agreement, he had the legal obligation to reimburse her whenever he would have money available and which he did during the Period.

[33] In my opinion, the appellant gave consideration in exchange for the transfer of property from her common-law partner. The considerations were in the form of advances and loans for his painting business' payroll, rent and his miscellaneous businesses and personal expenses.

[34] In my view, whether the advances and loans were used for business and personal purposes is not important to conclude that there has been adequate consideration. What truly matters is whether the said consideration results from a legal rather than a moral obligation. As I already mentioned, I am convinced that the said agreement was legally binding between them.

[35] I see no reason as to why the use made of the money lent by the appellant should undermine the validity of the loan or its enforceability.

[36] Where the transfers in issue are made as reimbursements pursuant to a contract, and that this contract was legally enforceable, they must be considered as constituting a consideration in exchange of those transfers.

[37] In addition, the fact that the loans and advances did not bear interest and that she had not been identified as a creditor of Mr. MacVicar in his 2004 bankruptcy's documents are not conclusive either as to the validity and enforceability of the said loans and advances. She perhaps was in a good position to determine whether any claim for the reimbursement of the money lent, would result in an actual payment.

[38] Regarding the money lent for Mr. MacVicar's rent, I would distinguish the present case from the Federal Court of Appeal's decision in *Yates* v *Canada,* 2009 FCA 50, in which Noël, J. stated:

> [42] The Judge had to determine whether Mrs. Yates had provided consideration at fair market value and, in my view, on the record before him, it is clear that the

> appellant did not provide such consideration. The Judge reached this conclusion based upon the view that only those household expenses which could be considered as “vital household expenses” were beyond the reach of subsection 160(1). In my respectful view, that approach is clearly erroneous.
>
> [43] To conclude, the appellant submits that she gave consideration at fair market value for the sums received from her husband. I see no evidence in the record to support that view. To make things perfectly clear, let me say that in allowing her husband to live in the family residence, the appellant did not provide consideration at fair market value. This is simply another attempt by Mrs. Yates to benefit from the exception found at subsection 160(4).
>
> (Emphasis added)

[39] In *Yates*, the taxpayer argued that, in consideration for her husband’s payments, she gave him the availability and use of the house she owned. She explained that her husband transferred money to her by reason of his legal obligation to support his family. She claimed that such household expenses, considered as “vital household expenses” or “family support expenses” were beyond the reach of subsection 160(1) of the *Act*. It was decided that a surrender of matrimonial property does not constitute consideration for a transfer of property pursuant to subsection 160(1) of the *Act*.

[40] Here, the appellant does not contend that her relationship status gave rise to an obligation on her behalf to support Mr. MacVicar. She relies on her claim that there was, prior to the purchase of the house, a binding agreement between them under which he would assume 50% of the mortgage payments, which amounted to $500 per month.

[41] These circumstances are more consistent with the *Ducharme v. Canada* decision, 2005 FCA 137, where Rothstein J. wrote:

> [5] It is a reasonable inference to draw from these facts that Ms. Ducharme gave to Mr. Vienneau the availability and use of her house in consideration for his payments on the mortgage. The amounts paid by Mr. Vienneau were tantamount to rent. The amounts paid were well under what appeared to be the fair market rental value of Ms. Ducharme's house and it cannot reasonably be said that the "rent" paid by Mr. Vienneau by way of making monthly mortgage payments on Ms. Ducharme's mortgage exceeded the fair market value of the consideration given by Ms. Ducharme to Mr. Vienneau.
>
> (Emphasis added)

[42] I am satisfied from the evidence before me that the appellant gave adequate consideration for the transfers received as she had:

(a) advanced, between January 1, 2002 and September 5, 2003, the aggregate sum of $67,329.05 to Mr. MacVicar for the purpose of paying his painting business' employees;

(b) paid the amounts of $3,150 and $9,058.50 respectively for the purchase of Truck #1 and Truck #2 between January 1, 2002 and October 31, 2003, which were both used strictly by Mr. MacVicar for the purpose of his painting business;

and that the sum of these amounts ($79,537.55) exceeds the sum of amounts received from Mr. MacVicar during the Period ($76,884.17) for which she was assessed under subsection 160(1) of the *Act*.

Conclusion

[43] Consequently, the appeal is allowed and the assessment is vacated. The appellant is entitled to her costs.

Signed at Ottawa, Canada, this 2nd day of June 2016.

"Réal Favreau"

Favreau J.

CITATION:	2016 TCC 139
COURT FILE NO.:	2011-2705(IT)G
STYLE OF CAUSE:	Michelle Coleen Connolly and Her Majesty the Queen
PLACE OF HEARING:	Halifax, Nova Scotia
DATE OF HEARING:	September 22 and 23, 2016
REASONS FOR JUDGMENT BY:	The Honourable Justice Réal Favreau
DATE OF JUDGMENT:	June 2, 2016

APPEARANCES:

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